

SUBCHAPTER F : FINANCIAL ASSURANCE MECHANISMS FOR LIABILITY

§37.501. Trust Fund for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing a fully-funded trust which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed duplicate of the trust agreement to the executive director.

(b) The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.601(a) of this title (relating to Trust Agreement for Liability), including a formal certification of acknowledgment as specified in §37.601(b) of this title.

(d) The trust fund for liability shall be funded for the full amount of the liability coverage to be provided by the trust before it may be relied upon to satisfy the requirements of financial assurance for liability. If at any time after the trust is created the amount of funds in the trust is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the trust, shall either add sufficient funds to the trust to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance mechanism as specified in this subchapter to cover the difference. For purposes of this section, "the full amount of liability coverage to be provided" means the amount of coverage for sudden accidental occurrences required to be provided less the amount of liability coverage being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(e) If the value of the trust fund is greater than the total amount of the required liability coverage, the owner or operator may submit a written request to the executive director for release of the amount in excess of the required liability coverage.

(f) If an owner or operator substitutes other financial assurance as specified in this subchapter for all or part of the trust fund, he may submit a written request to the executive director for release of the amount in excess of the required liability coverage as covered by the trust fund.

(g) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (e) or (f) of this section, the executive director, if he approves the request, shall instruct the trustee in writing to release to the owner or operator such funds.

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December 30, 1996

§37.511. Surety Bond Guaranteeing Payment for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability

Coverage) by establishing a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the bond to the executive director.

(b) The surety company issuing the bond shall be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.611 of this title (relating to Payment Bond for Liability).

(d) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to satisfy a third party liability claim as guaranteed by the bond.

(e) The penal sum of the bond must be in an amount, sufficient to satisfy the requirements for which financial assurance for liability is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the penal sum of the bond plus the amount of the combined mechanism(s) must be at least equal to the required liability coverage.

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidence by the return receipts.

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§37.521. Irrevocable Standby Letter of Credit for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.621 of this title (relating to Irrevocable Letter of Credit for Liability).

(d) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120 days shall begin on the

date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts.

(e) The irrevocable standby letter of credit must be issued in an amount sufficient to satisfy the requirements for which financial assurance is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the amount of the letter of credit plus the amount of the combined mechanism(s) must be at least equal to the required liability coverage.

(f) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this subchapter and obtain written approval of such assurance from the executive director.

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§37.531. Insurance for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining insurance which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the endorsement or certificate of insurance to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.631 of this title (relating to Certificate of Insurance for Liability); or the wording of the endorsement must be identical to the wording specified in §37.641 of this title (relating to Endorsement for Liability).

(d) The insurance policy shall be amended by attachment of the Liability Endorsement or evidenced by a Certificate of Liability Insurance. If requested by the executive director, the owner or operator shall provide a signed duplicate original of the insurance policy.

(e) The insurance policy must be issued for a face amount at least sufficient to satisfy the requirements for which financial assurance for liability is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the face amount plus the amount of the combined mechanism(s) must be at least equal to the required liability coverage.

(f) The insurance policy must guarantee that funds shall be available whenever needed to fulfill obligations of the insured under this chapter. Under the terms of the policy, the insurer shall become liable on the insurance obligation when the owner or operator fails to satisfy a third party liability claim as guaranteed by the policy. The policy shall also guarantee that when the third party claimant provides a valid certificate of claim for payment, the insurer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(g) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy by the owner or operator as specified in Subchapter A of this chapter. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(h) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the mechanism of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return of receipts.

(i) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

- (1) the executive director deems the facility abandoned; or
- (2) the registration or permit expires, is terminated, or revoked or a new or renewal registration or permit is denied; or
- (3) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction; or
- (4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or
- (5) the premium due is paid.

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§37.541. Financial Test for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability

Coverage) by demonstrating that he passes a financial test which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) tangible net worth of at least \$10 million; and

(C) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(2) the owner or operator must have:

(A) a current rating for the owner's or operator's most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth of at least \$10 million; and

(C) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(c) To demonstrate that the owner or operator meets this test, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer and worded as specified in the Financial Test for Liability, Part A, §37.651 of this title (relating to Financial Test for Liability). If an owner or operator is using the financial test to demonstrate both assurance for closure, as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure), and liability coverage, he must submit the letter specified in the Financial Test for Liability, Part B, §37.651 of this title to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title (relating to Financial Test) is not required; and

(2) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) he has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure, he found such amounts to be in agreement.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator shall send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, he shall send notice to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice shall be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

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§37.551. Corporate Guarantee for Liability.

(a) An owner or operator may meet the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a written guarantee for liability coverage, hereinafter referred to as "corporate guarantee," which

conforms to the requirements of this section, in addition to the requirements as specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.541 of this title (relating to Financial Test for Liability). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.661 of this title (relating to Corporate Guarantee). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.541(c) of this title.

(d) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to satisfy a judgement based on a determination of liability for bodily injury or property damage to third parties caused by sudden accidental occurrences, arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage;

(2) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator.

(e) In the case of corporation incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) the state in which the guarantor is incorporated; and

(2) each state in which a facility covered by the guarantee is located have submitted a written statement to the United States Environmental Protection Agency (EPA) that a guarantee executed as described in this section and §37.661 of this title (relating to Corporate Guarantee) is a legally valid and enforceable obligation in that state.